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January 8, 2008

Mr. R. Matthew Priest, Chairman
Committee for the Implementation of
Textile Agreements
U.S. Department of Commerce
Room H3001A
14th Street & Constitution Avenue, N.W.
Washington, D.C. 20230

**Re: Request for Public Comment on the Due Diligence Requirement Under
the Commercial Availability Procedures of the Dominican Republic-Central
American United States Free Trade Agreement**

Dear Mr. Chairman:

The following comments are being submitted pursuant to the above referenced request for public comments in connection with the operation of the due diligence requirements of the commercial availability procedures of the DR-CAFTA. We are submitting these comments on behalf of the numerous clients for whom we have assisted in making Commercial Availability Requests and are based on the knowledge and experience we have accumulated in doing so.

We are highly supportive of CITA's efforts to improve the operation and effectiveness of the Procedures. We are concerned, however, that the envisioned benefits of the Commercial Availability provision have not fully materialized. Generally, we believe the requirements of Requesters are highly burdensome and time consuming and should be streamlined to the extent possible. Further, we believe it is vital to the operation of the commercial availability provision that all parties are held accountable for actions and statements taken in the course of a request.

Communications between Requesters and Potential Suppliers

The Procedures, as currently organized, are highly legalistic and provide tacitly for legal liabilities. Further, the process of maintaining and documenting communications with every possible supplier in the region is highly time consuming. We support any efforts that CITA may undertake to lessen these burdens.

As Requestors, our clients have carefully considered the requirements provided in the Procedures and have determined that it is essential to seek outside counsel and assistance when undertaking a Request. Unless significant changes are made to lessen the documentation requirements and the apparent legal liabilities, it is imperative that outside counsel continue to be allowed to assist-Requestor.

Identification of Potential Suppliers

The Procedures require that Requesters perform the appropriate level of due diligence prior to submitting a request to CITA. In an ideal world, properly functioning industry associations would provide an effective and highly efficient vehicle for identifying members with the applicable capabilities. Unfortunately, the relevant industry associations are highly unresponsive to requests for information on their members. In fact, few ever provide any replies at all. In the absence of proactive actions on the part of industry associations, it is incumbent upon any Requester to contact every entity in the region that could conceivably produce the product at issue. This process is not only time consuming, but it is unduly burdensome on the requesting entity. Furthermore, there is no single source for identifying all potential yarn spinners, knitters or weavers in the region. There is no way for an apparel maker to know when a yarn spinner in Honduras puts in a few new machines that will make a variant yarn. If CITA could provide contact information and assume responsibility for the upkeep and accuracy of that database, more apparel makers could possibly make the appropriate connections with potential suppliers.

Content of Communications between Requesters and Potential Suppliers

We support any and all efforts to provide for specific product descriptions that are both understandable to the trade and enforceable by U.S. Customs & Border Protection.

CITA is seeking comments as to “whether and under what conditions potential requesters and potential suppliers should provide samples to each other”. We find this request highly disturbing. It should be noted that Annex 3.25 lists products that are not commercially available in commercial quantities in a timely manner. The term “commercially available” means “suitable or ready for use; usable; at hand.”¹ In practice, however, CITA has only required that a potential supplier show that it is capable of producing the article. We believe this disconnect has led to some of the frustration and confusion among the parties regarding the operation of the commercial availability process.

¹ Random House College Dictionary.

We believe that any potential supplier be required to provide a sample of the product at issue as proof that the article is “available”. Such a requirement could be fulfilled easily for any product that is truly “available”. Under normal business practices, the production of a sample is an absolute requirement. Purchase orders for yarns or fabrics are rarely, if not ever, issued prior to the production of a sample. Why then does CITA not require the same if it intends for potential requesters and potential suppliers to engage in normal business practices? There are rare instances where samples cannot be provided, either because the article is new and under development, or because the potential supplier is making an article that is comparable to the requested article, save for some minor characteristics. In these cases, potential suppliers should be required to show verifiable documentation that they possess and are currently using machinery or otherwise possess the capabilities to produce the article as specified in commercially meaningful quantities and in a timely manner.

The House Ways and Means Committee, when reporting out the DR-CAFTA implementing legislation specifically envisioned such a requirement. The Report states, in part:

“At the very least, when CITA determines that a good is available in commercial quantities, a sample of the good should be readily available for physical inspection by all parties as well as evidence of some effort to market the good in the United States.”

Further disturbing is the fact that CITA requires the supplier to legally verify that it has produced the product over the past two years. If the product has been made in the past two years as averred by the textile mill, then the provision of a sample should not be a burden or require additional cost.

In the normal course of business, samples are provided to the apparel maker which in turn may provide it to the retailer for prior approval before production. This is normal business practice. There are no additional costs incurred by the apparel maker to get the sample, nor is the apparel maker required to purchase a minimum amount of fabric.

CITA is also seeking comments as to what consideration should be given to time needed to develop new products. This request also causes concern for us since the Procedures specifically allow for such a situation. If a company cannot produce a given product, it is not “available” and should be placed on Annex 3.25. If a potential supplier subsequently develops the ability to make the product, it can then petition CITA for its removal from Annex 3.25. A flexible textile mill with the capacities that have been alleged by some mills could use the short supply petition process as a means of establishing a business base, but we do not see this happening, we only see these mills trying to force apparel makers to buy the fabrics that they can already manufacture that may not meet the required specifications.

There have been instances where potential suppliers have not responded to potential Requesters inquiries, yet have submitted Responses with an Offer to CITA. Such actions frustrate the operation of the Commercial Availability process and are not in accordance with normal business practices. CITA should take the view that, during the inquiry stage, “silence gives assent”. Any potential suppliers that do not respond to inquiries but later submit Responses should be rejected. In such an instance, the Responder should be required to petition to CITA to remove the fabric from the list.

Substitutability of Products

The principle of substitutability is being unevenly applied. Any product that is imported under the short supply provision must meet the specific criteria spelled out in Annex 3.25. CITA and Customs and Border Protection do not allow other products to be substituted for those on specifically described in the Annex. This same discipline should be applied to potential suppliers. If a product does not meet the specific criteria set out in a Request, it should not be deemed substitutable.

Potential Suppliers’ Responses to Requester’s Inquiry

CITA set out in its Procedures specific information that must be presented by a potential supplier when making a Response with an Offer. In practice, however, Responses have failed to fulfill these requirements. This omission, we believe, has led to much of the frustration and uncertainty that has been added to the process. Responders should be held to the requirements of the Procedures when making Responses. To date, no Response has fulfilled the requirements, yet CITA has accepted every one. If a Response does not meet the required criteria, CITA should reject it, as it does Requests. The Procedures currently allow for an extension of time for Responders to amend their Responses.

As noted above, the determination at issue is whether a product is “commercially available in commercial quantities in a timely manner”, not whether an entity is capable of producing it. Nonetheless, CITA’s requests that Responses provide information relating to the entity’s capability of producing the subject merchandise. We believe the inclusion of this information is misleading and the requirement should be removed. The responder should merely be required to report on the amount of subject merchandise it is currently producing. Such claims should be supported by providing a sample of the product at issue. All other information is superfluous and any Responses that do not specify this information should be rejected.

Other

We also believe CITA should take a more active role in the process. CITA requires and typically fully uses 6 weeks for non-controversial cases and nine weeks for controversial cases. However, CITA does not actively investigate claims made by any of the parties. The need for this amount of time is not clear to the public, particularly in

cases where no responses are filed. CITA should immediately approve all requests for which no responses are filed within the permitted time period. In the event responses are filed, CITA should take the time allotted to it to fully review any comments provided and actively investigate all claims being made.

We applaud CITA for its efforts to continue to review the short supply process to improve its use for all parties. We hope that CITA will issue revised procedures based on the comments contained herein. In addition, we remain available to meet with CITA officials to further explain these concerns and ways to effectively address them. If you have any questions or require further information, please contact Mark Haney at mhaney@strtrade.com.

Sincerely,

SANDLER, TRAVIS & ROSENBERG, P.A.

By: _____

Beth C. Ring

